Montana Law Review

Volume 40
Issue 2 *Summer 1979*

Article 5

July 1979

Products Liability in Montana: At Last a Word on Defense

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NOTES

PRODUCTS LIABILITY IN MONTANA: AT LAST A WORD ON DEFENSE

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For five years following the landmark case of *Brandenburger v. Toyota Motor Sales,*[1] the status of a plaintiff's contributory negligence in a products liability action brought in Montana was unclear. In *Brown v. North American Manufacturing Co.,*[2] the Montana Supreme Court recently allowed an instruction which, in effect, told the jury that a plaintiff's contributory negligence would not bar recovery, but that assumption of risk would. The purpose of this note is to discuss *Brown* and its effect on the present and future status of contributory negligence in Montana.

I. INTRODUCTION

In *Brandenburger,* the Montana Supreme Court adopted the doctrine of strict liability in tort for injuries resulting from defective products.[3] In that case, the court said it was approving "the *definition* as other jurisdictions have, set forth in 2 Restatement of Torts 2d § 402A . . . ."[4]

Contributory negligence was not an issue in that case, however, and the opinion did not discuss whether in an appropriate case it would also follow the Restatement view on that subject. Strictly reading the *ratio decidendi,* one must concede that only the core definition of section 402A[5] was accepted in *Brandenburger.*

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1. 162 Mont. 506, 513 P.2d 268 (1973).

2. ___ Mont. ___, 576 P.2d 711 (1978).

3. The theory, commonly called products liability, grew in part out of the case of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), in which Justice Traynor of the California Supreme Court applied strict liability to a manufacturer in a tort case. In 1965, the doctrine appeared in section 402A of RESTATEMENT (SECOND) OF TORTS (1965). By 1970, two-thirds of the states had adopted the theory.

Brandenburger was the key case in an exhaustive products liability survey compiled in 1977 by Carl Tobias and William Rossbach. *See* Tobias and Rossbach, *A Framework for Analysis of Products Liability in Montana,* 39 MONT. L. REV. 221 (1977).

4. 162 Mont. at 513, 513 P.2d at 272 (emphasis added).

5. Cited *id.* at 513, 513 P.2d at 272-73, the section reads as follows:

Section 402A Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to this property is subject to liability for physical harm thereby caused to the ultimate user, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

II. THE DILEMMA

Under section 402A of the Restatement, most forms of contributory negligence are not defenses to a strict liability action.[6] Frumer and Friedman point out, however, that the "language of the courts in dealing with contributory negligence as a defense to either warranty or strict liability is in confusion . . . ."[7] This minor chaos seems to grow out of a failure on the part of the courts to isolate and identify the nature of plaintiff's conduct being considered in each situation. In order to help analyze the cases, it is necessary to decide what type of plaintiff conduct bars recovery and then decide whether the plaintiff's conduct was of the fatal variety. The assignment is not given to easy solution, however, because of the semantic obstacle course created by case law and by the Restatement itself.

The concept of contributory negligence as a defense early was rejected by the Restatement in section 524 as to torts involving abnormally dangerous activity.[8] Comment n to section 402A of the Restatement, although making reference to section 524,[9] confused the issue by setting out two types of conduct, both bearing the same name, but having the opposite effect in a products liability action. The comment reads in part:

> *Contributory negligence* . . . is not a defense when such negligence consists merely in a *failure to discover the defect or to guard*

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule as stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

6. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965), reads as follows:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably encountering a known danger, and commonly passes under assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

7. 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16A(5)(f) (1965).

8. RESTATEMENT (SECOND) OF TORTS § 524 (1965) provides:

Since the strict liability of one who carries on an abnormally dangerous activity is not founded on his negligence, the ordinary contributory negligence of the plaintiff is not a defense to an action based on strict liability. The reason is the policy of the law that places the full responsibility for preventing the harm resulting from abnormally dangerous activities upon the person who has subjected others to the abnormal risk.

9. *Id.* Section 402A, Comment n reads in part: "Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see §524) applies."

> *against the possibility of its existence.* On the other hand, the form of *contributory negligence* which consists in *voluntarily and unreasonably proceeding to encounter a known danger* and commonly passes under the name of assumption of the risk, is a defense under the section . . . .[10]

Most commentators and virtually all jurisdictions agree that, while contributory negligence of the first type does not bar recovery,[11] contributory negligence of the second type will.[12]

Analysis is further complicated by those jurisdictions which categorize "misuse" by the plaintiff as an affirmative defense.[13] This view places the burden on the defendant to show that the plaintiff did not use the product in a way reasonably foreseeable by the manufacturer. In those jurisdictions, misuse takes its place beside contributory negligence consisting of assumption of risk in barring recovery by plaintiff.

Other jurisdictions, however, point out what seems to be the better-reasoned position on misuse—that "[a]lthough some writers refer to abnormal use (a use not reasonably anticipated) as a defense to the action, it is not properly a defense, but a necessary element of plaintiff's cause of action."[14]

In Montana, as in other jurisdictions, the effect of contributory negligence in product liability cases has been unclear. The confusion is primarily attributable to two post-*Brandenburger,* pre-*Brown* cases, *Oltz v. Toyota Motor Sales*[15] and *Duncan v. Rockwell Manufacturing Co.*[16] The opinions in both cases appeared to recognize some type of contributory negligence as a defense to a products action.

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10. *Id.* (emphasis added).

11. *See, e.g.,* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976). *See also* Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974); Findlay v. Copeland Lumber Co., 265 Ore. 300, 509 P.2d 28 (1973).

12. *See, e.g.,* Williams v. Brown Mfg. Co., 45 Ill. 481, 261 N.E.2d 305 (1970). Some jurisdictions apply comparative negligence to assumption of risk conduct. *See, e.g.,* Sell Teagle v. Fisher & Porter Co., 89 Wash. 2d 149, 570 P.2d 438 (1977).

13. *See* Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970); Williams v. Brown Mfg. Co., 545 Ill. 2d 418, 261 N.E.2d 305 (1970); Epstein, *Products Liability,* 1968 UTAH L. REV. 267.

14. Rogers v. Toro Mfg., 522 S.W.2d 632, 637 (Mo. App. 1975), *citing* 38 So. CAL. L. REV. 30 (1965). *See also* 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 16A(4)(e)(ii) (1965): "The task of claimant's counsel is to show that the damaging event resulted in the course of a normal use of the product and not from an unforeseeable misuse." Montana apparently is in accord. *See* Barrich v. Ottenstror, ___ Mont. ___, ___, 550 P.2d 395, 398 (1976), where the court said, "While a specific defect need not be shown where the evidence tends to negate injury producing causes which do not relate to a defect, this rule cannot be applied unless the evidence also negates the misuse or mishandling of the product by plaintiff."

15. 166 Mont. 217, 531 P.2d 1341 (1975).

16. ___ Mont. ___, 567 P.2d 936 (1977).

A. Oltz v. Toyota Motor Sales

Oltz was a products liability action involving the same accident which gave rise to the *Brandenburger* case. Both were second collision cases.[17] Oltz was driving and Brandenburger was riding with him in a 1969 Toyota Land Cruiser automobile. Oltz, swerving to avoid some rocks on the road, lost control of the car which left the road and overturned. The fiberglass top popped off, the two men were thrown out, Brandenburger was killed, and Oltz was injured. Recovery was allowed in *Brandenburger* and denied in *Oltz*.

In affirming the trial court's summary judgment for defendants in *Oltz*, Justice Harrison, writing for the majority, foreclosed the plaintiff's right to recover because of "his own contributory negligence in the operation of the vehicle."[18]

Measured against the principles enunciated in *Brandenburger*, the rationale for the decision is questionable.[19] It must be noted that the court in *Brandenburger* premised that decision on the holding that "the duty of Toyota to provide a safe roof is not eliminated simply because the defective roof did not cause the accident."[20] For purposes of analysis, then, a "second collision" products liability case should not be distinguishable, either as to liability or defenses, from one in which the defect is the primary cause of the accident.

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17. "Second collision" was at the time of *Brandenburger* an emerging doctrine. The theory is explained in *Brandenburger* as follows:

> In the recent years courts have held that where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for injury caused by its failure to use reasonable care in design. These injuries are readily foreseeable as an incident to the normal and expected use of the car. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury producing impacts.

162 Mont. at 516, 513 P.2d at 274.

18. 166 Mont. at 220, 531 P.2d at 1343.

19. Tobias & Rossbach, *supra* note 3, at 279, n. 342, points out that:

> [T]here is considerable ground for questioning the reasoning and authority the court used in reaching its decision. Justice Castles [sic] said the court had examined the authorities cited by both parties before deciding; however, neither of the cases cited in the opinion in any way supports the decision reached. The first, Adams v. Ford Motor Co., 103 Ill. App.2d 356, 243 N.E.2d 843 (1968), was a lower appellate court opinion which had been effectively overruled by the Illinois Supreme Court nearly five years before the *Oltz* decision. In *Adams*, the court relied on an earlier opinion which was specifically reversed by the supreme court in Williams v. Brown Mfg. Co., 45 Ill.2d 418, 261 N.E.2d 305 (1970).
>
> The second case relied on, General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969), did not even involve second collision liability or the defense of contributory negligence. The trial court had given certain instructions regarding the negligence of the plaintiff as a defense, but the appellate court made it clear that the instructions dealt with *misuse* of the product, *not contributory negligence*. *Id.* at 680.

20. 162 Mont. at 517, 513 P.2d at 274.

Nonetheless, the court in *Oltz* concluded that contributory negligence in the operation of a vehicle sufficient to cause it to leave the roadway was a proper defense to an action for failure to design a crashworthy vehicle.[21]

The court could not have rested its decision on a finding that Oltz "voluntarily and unreasonably proceeded to encounter a known danger" thus assuming the risk, because the opinion conceded that "the alleged manufacturing defect was *unknown* to the operator."[22] Neither is it likely that the court hung its decision on the peg of misuse, since the same court concluded in *Brandenburger* on the same facts that injuries from automobile accidents are "readily foreseeable [by the manufacturer] as an incident to the normal and expected use of the car."[23]

There are four possible explanations for the *Oltz* holding. The court could have intended that contributory negligence in all forms be a defense to a products liability action. In view of the earlier clear adoption in *Brandenburger* of secton 402A and the policy reasons there expounded, this interpretation seems unlikely. Second, the court may have read Comment n narrowly to excuse only "the failure to discover the defect or to guard against the posssibility of its existence." Third, the opinion may have distinguished between gross and ordinary negligence of a plaintiff. Finally, the court may not have intended that contributory negligence bar recovery, but rather intended to carve out an exception in second collision cases where the plaintiff is the driver.

To the extent that the *Oltz* opinion held that any form of negligence, gross or ordinary, is a defense in a products liability case, the holding is impliedly overruled by *Brown.* If the case is rationalized according to the fourth theory, the decision is out of harmony with the *Brandenburger-Brown* philosophy and should be overruled at the first opportunity.[24]

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21. The court in *Oltz* said:

> We have carefully examined the authorities cited by both parties and hold that where, as here, in a strict liability case involving an alleged manufacturing defect that was unknown to the operator and which apparently had nothing to do with causing the accident in question but merely contributory negligence [sic] in the operation of the vehicle so as to cause it to leave the highway is a proper defense.

166 Mont. at 220, 531 P.2d at 1343.

22. *Id.*

23. 162 Mont. at 517, 513 P.2d at 274.

24. *Oltz* is contrary to the prevailing judicial trend toward allowing recovery in second collision cases. No case was found where a jurisdiction adopted the second collision doctrine but foreclosed recovery by the injured driver. *See generally* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1978). *See also* cases collected in Annot., 42 A.L.R.3d 560 (1972).

B. Duncan v. Rockwell Manufacturing Co.

Duncan v. Rockwell Manufacturing Co.[25] was also before the court on a summary judgment. The plaintiff contended on appeal that the issue of contributory negligence was not susceptible of summary judgment. In affirming the judgment on other grounds, the court said, "We need not consider whether summary judgment was the *proper vehicle* in the instant case for establishing contributory negligence as a matter of law."[26] It could well be inferred that the court there was saying contributory negligence *would* be a valid defense in a trial on the merits.[27]

Against the muddled background of *Oltz* and *Duncan,* the stage was set for a case to clarify the issues of defenses in a products liability action, and *Brown* came on the scene with the needed issues at the opportune time. The court mulled over the decision for five months. The case, submitted September 28, 1977, was finally handed down February 9, 1978. Without expressly overruling *Oltz* or explaining *Duncan*, the court in *Brown* announced that contributory negligence is not a defense to an action in strict liability.

III. Brown and Beyond

A. *The Case*

The leg of the plaintiff in *Brown v. North American Manufacturing Co.*[28] was severed above the knee by an auger in a Grain-O-Vator feed distributing machine. The machine was one year old when the plaintiff purchased it. He used it in his ranching operation for the three years prior to the accident.

The plaintiff alleged that the machine was defectively designed in that the "excess" door covering the auger was hinged at the bottom, thereby allowing the door to open and expose the operator to potential danger. The injury occurred when plaintiff, after climbing up to look into the grain bin, stepped back into the auger that had been exposed by the unexpectedly opened excess door.

The defendant maintained that the plaintiff's injuries could have been avoided had he turned off the power to the grain machine before climbing into it. Accordingly, the defendant raised the defense of contributory negligence in the pre-trial proceedings, but the trial court granted the plaintiff's motion to strike that issue from the

25. ___ Mont. ___, 567 P.2d 936 (1977).

26. *Id.* at ___, 567 P.2d at 940 (emphasis added).

27. In a dissenting opinion, Justice Shea noted that "the basis of the district court's ruling was that the plaintiff was guilty of contributory negligence. However, contributory negligence is not a defense in a case involving strict liability." *Id.* at ___, 567 P.2d at 941.

28. ___ Mont. ___, 567 P.2d 711 (1978).

case. The defendant did not appeal the ruling, apparently believing that contributory negligence was not a valid defense. At the trial, the defendant then urged the court to instruct the jury on assumption of risk. The plaintiff's objections to a bare assumption of risk instruction resulted in the court's Instruction No. 10 being given:

> You are instructed that assumption of risk is voluntarily placing oneself in a position to chance known hazards. If a person has assumed the risk, he cannot recover for any injury or damage sustained by him. In determining whether plaintiff assumed the risk, *you are not to consider whether or not plaintiff exercised due care for his own safety . . . .*[29]

The case turned on this instruction.[30] The language of the holding is somewhat less than concise, but the effect is clear. The court refused to reverse the case because the instruction was given. In so deciding, it held that it was not reversible error to instruct the jury that contributory negligence in the form of failure to exercise due care is not an issue in a products liability case, but that assumption of risk will bar recovery. The court disapproved the instruction for future cases, however, because it "improperly inserts contributory negligence" into the case and "could cause jury confusion."[31]

Justice Haswell's concurring opinion states the holding more succinctly: "As pointed out in the majority opinion, contributory negligence is not a defense to a products liability case, but assumption of risk is a complete bar to recovery."[32] He commented that in his view Instruction No. 10 "is a correct statement of the law"[33] and reiterated that it was the traditional lack of due care form of contributory negligence about which the court was speaking in *Brown*.[34]

Having ruled that a plaintiff's lack of due care is not a defense in a products liability case, the opinion turned to the other type of plaintiff conduct to be considered—the voluntary encounter with a known risk. Justice Harrison, writing for the court, noted there was some confusion as to the standard to be applied in an assumption

29. *Id.* at ___, 576 P.2d at 720 (emphasis added).

30. The opinion spoke decisively on the question of whether an open and obvious danger is a defect. The issue was unsettled in Montana, but there is a split of authority generally. The court erased all doubt as to its position, saying, "Defendant here advances the 'open and obvious danger' or 'patent-latent' rule as a bar to plaintiff's recovery under the theory of strict liability. *We reject such a rule.*" *Id.* at ___, 576 P.2d at 717 (emphasis added). The court said, "We reject any rule which would operate to encourage misdesign." *Id.*

The powerful language was *dicta*, however, because the court said the "evidence in the instant case [tended] to support a finding that the danger was hidden, rather than open and obvious . . . ." *Id.*

31. *Id.* at ___, 576 P.2d at 721.

32. *Id.* at ___, 576 P.2d at 723.

33. *Id.*

34. *Id.*

of risk defense and succeeded in dispelling doubt about the future law in Montana. He discussed the remaining part of Instruction No. 10 which dealt with voluntary assumption of risk. Drawn from the Montana Jury Instruction Guide,[35] the instructions set out four factors to be considered in deciding whether the plaintiff assumed a risk.[36] The first requires the defendant to prove that the plaintiff had knowledge, actual *or implied,* of the particular condition. Justice Harrison said flatly that, in the future, "[i]n an instruction on assumption of risk . . . the words 'actual' and 'implied' will not be used,"[37] and "in products cases the defense of assumption of risk will be based on a subjective standard rather than that of a reasonable man test."[38]

The *Brown* decision is an important development in Montana products liability law. In *Brandenburger,* Justice Harrison explained the reasoning behind products liability: "The essential rationale for imposing the doctrine of strict liability in tort is that such imposition affords the consuming public the maximum protection from dangerous defects in manufactured products by requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products."[39] This policy would not be served if a plaintiff's conduct, however negligent, could excuse the manufacturer from his obligation.

B. *A Suggested Framework for Evaluating the Plaintiff's Conduct in a Products Liability Setting*

Montana has the opportunity to start afresh in establishing a clear framework for analysis of the plaintiff's conduct in a products liability setting. *Brown v. North American Manufacturing Co.*[40] declares that in Montana contributory negligence does not bar recovery, but assumption of risk does. With *Brown* as a guideline, the Montana Supreme Court will, it is hoped, carefully label and define the acceptable and prohibited conduct on the part of the plaintiff in future products liability cases. The author suggests that plaintiff

35. *Committee on Montana Jury Instruction Guides (MJIG) of Montana Judges Association, Montana Jury Instruction Guide.*

36. "1. That he had knowledge, actual or implied, of the particular condition.
2. That he appreciated the condition as dangerous.
3. Voluntarily remaining or continuing in the face of the known dangerous condition.
4. Injury resulting as the usual or probable consequence of this dangerous condition.
If you find all four of the above factors did exist at the time of the plaintiff's injury, he cannot recover." ___ Mont. at ___, 576 P.2d at 720.

37. *Id.* at ___, 576 P.2d at 721.

38. *Id.* at ___, 576 P.2d at 719.

39. 162 Mont. at 517, 513 P.2d at 275.

40. ___ Mont. ___, 576 P.2d 711 (1978).

conduct which will not bar recovery be labeled "contributory negligence," which should be defined as "failure to exercise due care." This definition is broader than the one set out in Comment n of section 402A,[41] where the excusable activity is "failure to discover the defect or to guard against the possibility of its existence." The only other conduct offered for consideration by Comment n is assumption of risk. Arguably, this leaves between the two defined standards a wide variety of plaintiff activity for which there is no rule. The proposed *Brown* rule would draw the total range of plaintiff conduct within defined and predictable categories thereby closing the gap left by Comment n.

An overwhelming number of jurisdictons have gone beyond the restrictive parameters of the Restatement. Some cite Comment n,[42] but interpret it to say that "conventional contributory negligence of the plaintiff is not a defense."[43] Acceptable conduct has been described by other courts as "inadvertance, momentary inattention"[44] and "a garden variety type of negligence which would not insulate defendants from liability."[45] The majority doctrine has been summarized as follows: "Generally, simple, ordinary, or traditional contributory negligence is not a defense in an action based on strict liability."[46]

It is further urged that plaintiff conduct which does bar recovery be labeled "assumption of risk," which should be defined as "voluntarily and unreasonably encountering dangers *actually known* to the actor." In order to clarify opinions in products liability, the use of the term "contributory negligence" for assumption of risk conduct should be abrogated in Montana.[47] It is submitted that

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41. *See supra*, note 6.

42. *See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426, 261 N.E.2d 305, 309-10 (1970).

43. *See, e.g.*, Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420, 423 (Tex. Civ. App. 1970).

44. Elder v. Crawley Book Mach. Co., 441 F.2d 771, 774 (3rd Cir. 1971).

45. Gangi v. Sears, Roebuck & Co., 33 Conn. Sup. 81, 360 A.2d 907, 909 (1976).

46. 72 C.J.S. *Products Liability* § 45 (Supp. 1975). The concept extends to more than ordinary negligence. In Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976), a second collision case, the trial court excluded evidence that the plaintiff's decedent, driving at excessive speeds, entered an intersection on a red light. The court of appeals affirmed, saying contributory negligence was not a defense to a products liability action.

47. This change would not be inconsistent with the court's position with respect to the comments to secton 402A. Justice Shea, writing for the majority in Stenberg v. Beatrice Foods Co., ___ Mont. ___, 576 P.2d 725, 729 (1978), said:

> We emphasize that this Court adopted the rule as set out in the Restatement, but we did not and do not intend the restraints in the comments to this rule to hamstring us in developing and defining the rule of strict liability. To the extent that the comments are helpful in our development of the law, we shall accept them; but we will reject them where we believe a more appropriate explanation of the rule of strict liability can be provided.

such a framework as is here outlined implements the policy considerations set out in *Brandenburger*[48] and reflects the positive steps taken in *Brown*.

48. *See Brandenburger*, 162 Mont. at 514, 515, 513 P.2d at 273.